ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

June 9, 2003

Chairman Michael K. Powell
Federal Communications Commission
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Commissioner Michael J. Copps
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Commissioner Kathleen Q. Abernathy
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Commissioner Jonathan Adelstein
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**Re: *Ex Parte* Communication in CC Docket Nos. 01-318, 01-321**

Dear Chairman Powell and Commissioners:

Since FCC adoption of the *Local Competition, First Report and Order*, ALTS has repeatedly asked the FCC to take one action – adopt self-executing performance metrics to ensure that facilities-based CLECs have timely access to the essential, bottleneck transmission facilities. Thus, ALTS members were heartened to hear Chairman Powell tell the Senate Commerce Committee last January that "[i]n local competition policy, the FCC will consider two sets of proceedings"[1] – *Triennial Review* and *Performance Metrics*. The Chairman noted specifically that "after bringing the *Triennial Review* to the floor the Commission will consider whether it should establish and enforce national performance measurements and standards for ILEC provision of UNEs . . ."[2] and continued to state that the FCC "initiated [the metrics proceedings] as a recognition that *effective and efficient enforcement of our regulation is just as, if not more, important than the underlying regulations*."[3]

[1] Written Statement of Michael K. Powell, Chairman, Federal Communications Commission, *Competition Issues in the Telecommunications Industry*, before the Committee on Commerce, Science, and Transportation, United States Senate, January 14, 2003.

[2] *Id*.

[3] *Id*. (emphasis added).

While ALTS member companies await to see the results of the UNE Review and the level of access that will be allowed to ILEC-controlled facilities, the FCC should waste no more time in adopting rules that ensure timely and efficient access to these facilities. A clear delineation of what elements and services must be made available to requesting CLECs does not ensure timely and cost effective access. Only ILEC adherence to performance metrics with swift, certain and meaningful penalties will ensure that the ILECs behave as competent wholesalers where a competitive wholesale marketplace does not yet exist.

ALTS, however, is concerned by recent statements that the long-promised, long-awaited performance metrics rules are no longer foremost on the FCC's competition policy agenda. Recent reports suggest that adoption of radical broadband rules and a notice seeking dramatic revisions to TELRIC pricing rules are likely to precede adoption of performance metrics for CLEC access to ILEC-controlled network elements and services.

The Telecommunications Act of 1996 and the FCC's rules to implement that Act grant competitive local exchange carriers the right to purchase UNEs from the incumbent carriers. Unfortunately, for the past seven years, this strong federal right has lacked an enforceable remedy. In fact, the absence of enforceable performance metrics and standards to ensure timely delivery of wholesale inputs makes even the most pro-competitive unbundling rules virtually meaningless. Now that the FCC is about to issue a new order concerning the list of UNEs, we firmly believe the FCC should issue corresponding metrics, performance guidelines and automatic penalty provisions governing the provision of UNEs and special access.

ALTS has for several years asked the FCC to adopt strong enforcement measures to ensure that the ILECs cannot take unfair advantage of their market power and monopoly control over bottleneck facilities when providing access and interconnection to their chief rivals, who also happen to be their wholesale customers.[4] ALTS' hope was that the FCC could take minimal action to ensure that the wholesale telecommunications marketplace would replicate a competitive market where a monopoly environment otherwise would not allow for equal bargaining among parties.

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[4] In ALTS' initial comments to the FCC in the first NPRM on local competition back in 1996, ALTS asked the FCC to require the ILECs to bargain in good faith over inclusion of ordinary business rules, or self-executing performance metrics, in interconnection agreements. When the FCC declined to require such good faith negotiation, ALTS submitted a simple reconsideration petition, upon which the FCC has not yet acted. *ALTS Petition For Clarification And Reconsideration*, CC 96-98, (filed September 30, 1996). ALTS renewed this petition two years ago when the FCC indicated that all dated petitions would be denied unless explicitly renewed. *Letter from Jonathan Askin to Dorothy Attwood in response to the Commission's July 11, 2001 Public Notice, DA 01-1648 regarding refreshing the record on petitions for reconsideration of the Local Competition First Report and Order in CC Docket No. 96-98* (filed September 10, 2001). In May, 2000, ALTS filed another straight-forward petition with the FCC, seeking guaranteed intervals for the provisioning of loop facilities. *Petition of Association for Local Telecommunications Services for Declaratory Ruling: Broadband Loop Provisioning, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147, 96-98, 98-141, NSD-L-48 DA 00-891, May 17, 2000; *Pleading Cycle Established for Comments on ALTS Petition for Declaratory Ruling*: *Loop Provisioning*, CC Docket Nos. 98-147, 96-98, 98-141, NSD-L-00-48, DA 00-114, 15 FCC Rcd 18671 (2000). More than two-and-a-half years have passed without FCC action on this petition.

ALTS was encouraged when the FCC issued notices of proposed rulemaking last year proposing a limited set of metrics and standards for the provisioning of network elements and special access.[5] ALTS, at the time, believed that a sufficient record already existed to allow the FCC to adopt such metrics and standards without additional comment. Nevertheless, ALTS filed extensive additional comments in response to those notices, detailing the ILECs' provisioning problems and delays that have made it extremely difficult to compete on a level playing field with the ILECs.

Unfortunately, the metrics proceedings appear to be languishing once again. ALTS members participated in several meetings with FCC staff over the past two years in which we provided substantial amounts of additional documentation of the provisioning difficulties for both UNEs and special access. Frankly, the industry anticipated that an order adopting such metrics and standards would have been released by now, giving ILECs, CLECs, and regulators the necessary insight into what behavior constitutes "just and reasonable" and "nondiscriminatory" provisioning.

There are several reasons why the FCC should issue an order adopting performance metrics, standards and penalty provisions:

*1. CLECs continue to experience significant provisioning delays and denials.*

The FCC has recognized the two fundamental needs of facilities-based CLECs attempting to reach end-user customers to provided competitive services with their own equipment and technologies: (1) the need for timely and cost-effective collocation in ILEC offices, and (2) the need to obtain timely and cost-effective access to ILEC transmission facilities. To its credit, the FCC took major steps over the past three years to fill existing loopholes in the FCC collocation rules, most notably, through the adoption of a Federal collocation provisioning interval.[6] The FCC has yet to act to resolve the remaining obstacle – faulty and time-consuming provisioning of transmission facilities.

The CLECs continue to experience extraordinary delays, denials and overcharges in seeking to purchase UNEs and special access.[7] The latest problem is the "no facilities" issue,

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[5] Notice of Proposed Rulemaking, *Performance Measurements and Standards for Unbundled Network Elements and Interconnection*, CC Docket No. 01-318 (rel. Nov. 8, 2001); Notice of Proposed Rulemaking, *Performance Measurements and Standards for Interstate Special Access Services*, CC Docket Nos. 01-321 (rel . Nov. 16, 2001).

[6] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 15 FCC Rcd 17806 (2000) (noting that timely provisioning of collocation space is essential to a CLEC's ability to compete effectively, and that absent national standards, ILECs will continue to delay unreasonably CLECs' build-out of their own facilities).

[7] Several recent ex parte presentations submitted by CLECs in the UNE Review Proceeding, WC 01-338, underscore the growing concern over poor wholesale provisioning. *See, e.g.*, Letter from Dave Conn, Deputy GC, McCleodUSA to Marlene Dortch, dated Nov. 15 (detailing a multiplicity of lingering loop provisioning deficiencies including UNE-P to UNE-L migration problems, stand-alone UNE loop cutover problems, and DLC loop provisioning problems); Letter from Jonathan Askin, GC, ALTS, to Bill Maher, dated Nov. 14, 2002 (detailing recurring failure by ILECs to provision enhanced extended links to CLECs); Letter from Mary Albert, VP, Allegiance Telecom, to Marlene Dortch, dated Oct. 1, 2002 (reporting upwards of 50% DS1 UNE loop rejection rates); Letter from Thomas Jones, partner, Willkie Farr, on behalf of Conversent Communications, to Marlene

where the RBOC rejects a request to provision a UNE with the allegation that no facilities are available. CLECs often find, however, that when they request the same facility either as a UNE-P line or as special access, the RBOC provisions the requested facility. The RBOC should not be allowed to game the system in this manner.

Because of the lack of specific, enforceable rules requiring ILECs to provision functioning transmission facilities to requesting carriers in a timely and reliable manner, incumbents have been given a seven-year free pass to deny, delay, and degrade the facilities they provide to CLECs. A loop provisioned a month late is no better than a loop never provisioned at all. Few customers will await service for so long, especially when another option – retail service from the very same ILEC that denied a timely wholesale loop – is usually available in a matter of days.

*2. Performance metrics, standards and penalties will promote facilities-based competition.*

As the FCC is aware, ALTS is the trade association representing facilities-based CLECs. Our companies deploy circuit and packet switches, DSLAMs, fixed wireless antennas, fiber optic trunks, and other facilities. We simply cannot, however, replicate the entire ILEC networks overnight. Our companies must purchase UNE transmission facilities and special access from the ILEC to connect our facilities with our customers. If we cannot obtain the timely provision of UNEs and special access, we have no incentive to invest in and deploy additional state-of-the-art facilities. As it is, too much CLEC equipment, much of it capable of delivering affordable, new, innovative services, lies fallow because the ILECs make it so difficult for CLECs to reach end-users. And, perhaps all too often, CLECs rely on UNE-P while their own switches remain unfilled, because of ILEC failures to provision stand-alone loops and transport with any provisioning time and service guarantees.[8]

*3. Plight of the CLEC industry.*

The CLEC industry is struggling financially. A recent ALTS report documents that only a couple of the publicly-traded CLECs are profitable. It is no exaggeration to say that the very future of the local competitive industry is at stake. The goals of Congress to create a competitive local telecom marketplace are in severe jeopardy. It would be one thing if the CLEC industry failed due to its own poor management or financial mismanagement. But it would be inexcusable if local competition evaporated because of the government's failure to implement the Telecom Act and enforce the unbundling rules.

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Dortch, dated Nov. 7, 2002 (detailing inability to obtain DS1 UNE loops and transport as well as staggering overcharges for unbundled transmission facilities).

[8] Furthermore, access to verifiable evidence of ILEC provisioning of facilities and services to competitive carriers will be an essential tool to regulators as they apply a granular UNE "impairment" analysis to determine when a competitive carrier is not impaired without access to a particular network element. For instance, dramatic improvements in the provisioning of one network element may help the regulator determine that the competitive carrier is not impaired without access to another element.

*4. The 271 Process is almost completed.*

Arguably, the RBOCs had an incentive to implement the unbundling rules of section 251 because they were a necessary pre-requisite to obtaining authority to provide interLATA service under section 271. As of today, the FCC has granted 271 authority to the RBOCs in most of the states. Whatever incentive there was to comply with the unbundling rules prior to receiving approval is or will soon be non-existent. Stated differently, now that the "carrot" has been eaten, only the enforcement "stick" remains viable.

*5. Other enforcement safeguards are about to expire.*

The Bell Companies have been relieved of many of their accounting and other reporting obligations.[9] Furthermore, the statutory requirements under Section 272 imposed on Bell Companies providing in-region interLATA services have begun to sunset without any stop-gap to ensure that ILECs still provision services to their rivals in a nondiscriminatory manner. ALTS urged the Commission in its comments in that proceeding not to allow these provisions to sunset after the 3-year period provided in Section 272(f)(1). However, if the Commission were to decide to allow the structural and nondiscrimination safeguards to sunset, ALTS submitted that the Commission must immediately adopt and impose performance metrics and standards for special access and UNE provisioning. Unless performance metrics and standards are in place before these actions are taken, the ILECs will be free to discriminate against their wholesale customers/competitors without viable regulatory oversight and without any knowledge of what "just and reasonable" and "nondiscriminatory" provisioning means. In the absence of performance measurements and standards, no one – not CLECs, regulators or arbitrators, or even well-intentioned ILEC provisioning agents – could adequately know what is just and reasonable and nondiscriminatory provisioning in order to detect and deter ILEC unreasonable provisioning practices. As a result, like the fox writing the rules governing access to the chicken coop, the ILEC has been able to unilaterally determine what constitutes adequate provisioning.

The RBOCs nevertheless continue to object to the FCC's adoption of performance metrics. Their concerns are unfounded and will be addressed briefly below:

a. Regulatory burden -- Adoption of performance metrics would not impose significant new burdens either on regulators or the industry. In fact, adoption of performance metrics can reduce discrimination merely because a measurement process is in place. Performance measurements create a public record of obligations and oversight and increase the likelihood of detection, which deters bad behavior. Furthermore, regulatory oversight would be further streamlined through adoption of self-effectuating remedies. Finally, many ILEC wholesale agents have expressed concern to their CLEC counterparts that they do not know what just and reasonable and nondiscriminatory provisioning means. Explicit metrics and standards

[9] *See, e.g.*, Notice of Proposed Rulemaking, *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC 02-112 (rel. May 24, 2002). ALTS noted that given the recent accounting scandals and the questionable accounting by BOCs in their ARMIS reporting, the Commission should not sunset the very provisions that might allow regulators to monitor the BOCs' activities to curb anti-competitive behavior.

would give these well-intentioned wholesale providers the guidance they need to provision adequately.

b. Contract Provisions – The RBOCs allege that enforcement metrics and penalties should be left to individual negotiations between the RBOC and the CLEC in reaching their interconnection agreements. As we are all too aware, the CLEC is still in the unenviable position of being the wholesale customer of a reluctant supplier that is also the CLEC's chief competitor. But for ILEC market power and control over essential bottleneck facilities, ILEC-CLEC interconnection agreements would undoubtedly include normal business rules with liquidated damages provisions. Virtually every contract between parties in any competitive industry includes such provisions. In fact, CLEC contracts with parties other than ILECs generally include such provisions. But the ILECs uniformly object to the inclusion of such metrics and penalty provisions in their contracts. Because the CLEC has no alternative supplier of wholesale facilities available to it, the CLEC often must accept the ILECs' terms as a condition of reaching agreement on the interconnection agreement. Until ILECs are compelled by natural competitive market forces to negotiate such ordinary business rules, the FCC must fill the void caused by the ILEC's overwhelming market power and control over bottleneck facilities and the ILECs' obvious reluctance to deal fairly with their competitors/wholesale customers.

c. State Metrics – The ILECs further allege that the states have already adopted metrics, standards and penalties. In fact, the RBOCs sometimes complain that they are already subjected to thousands or tens of thousands of performance metrics under state law. ALTS supports many of these state metrics, many of which have been adopted at the request of CLECs. Most states, however, have no metrics governing provisioning of interstate special access. Furthermore, some states have no UNE metrics; many others have established UNE metrics that are too weak, vague or unenforceable; others do not have the legal authority to compel the payment of remedies; and other states simply have no inclination to enforce what might seem on paper to be worthy metrics, standards and penalties. As a result, many CLECs would not consider offering competitive service in many states without even a minimum set of national performance metrics and standards based on a set of "best practices" from among the states on which to rely and without a regulatory body able and willing to interpret and enforce a clear set of cognizable, enforceable standards. Finally, many CLECs offer service across state borders, across regions, even across the country. A minimum set of national metrics and standards based on a set of "best practices" from among the states is critical to allow these CLECs to develop uniform provisioning and marketing systems so that they know and can meet the timing and quality of service needs of their potential customers.[10]

ILECs have an obvious anti-competitive incentive to discriminate against CLECs when providing UNEs. ILECs have incentive to raise their rivals' costs, to decrease the quality of rivals' service offerings, and to increase time to deploy competitive services. Properly constructed measurements and standards will enable regulators and industry members to detect

[10] It must be reiterated that any Federal metrics and standards must serve as a floor, above which states remain free to maintain their own metrics and standards to promote competitive local markets. A minimum level of Federal metrics and standards that simply reflect the lowest common denominator of the states would be worthless because they would encourage some states to reduce existing metrics.

such discrimination and, when linked to adequate self-effectuating remedies, might also effectively deter ILECs from engaging in such discrimination.

ALTS is not looking for a perfect set of UNE and special access metrics and standards out of the box. ALTS believes that, rather than delaying the metrics proceedings in an attempt to perfect the measurements, standards and penalties at the outset, it is more important that the FCC quickly adopt a reasonable, preliminary set of best practices measurements, standards and penalties and establish a process for modifying them over time to meet changing needs in the industry.

For these reasons, we ask you to adopt performance metrics, standards, and penalties for ILEC provisioning of network elements and special access in conjunction with adoption of any revisions to the rules governing ILEC provisioning of network elements and services, before the ILECs are relieved of any more reporting obligations, and before the structural and nondiscrimination safeguards are lifted from Bell Companies providing in-region interLATA services.

Respectfully submitted,

/s/

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